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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 924

COMMONWEALTH OF VIRGINIA, *Petitioner*

vs.

IMPERIAL COAL SALES COMPANY, INCORPORATED,

Respondent

BRIEF ON BEHALF OF RESPONDENT, IMPERIAL COAL SALES COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

I.

OPINIONS OF THE COURT BELOW

The opinions of the Supreme Court of Appeals of Virginia (R 46 and R 61), on Writ of Error, delivered January 12, 1933, and on petition for rehearing, delivered January 11, 1934, not yet officially reported, are unofficially reported in 167 S. E. 268 and 172 S. E. 927, respectively.

II.

JURISDICTION

The respondent in the courts below insisted upon both a federal and a non-federal question, both of which were resolved in its favor by the Supreme Court of Appeals of Virginia.

> "In the Court below and in this Court, the sales company has contended and does contend that it is not assessable with the taxes here in question, because, (a) the tax statutes referred to, and which will later be quoted, do not authorize the imposition of the taxes, and have no application to it, and, (b), if they are applicable to it, the assessments are invalid because the said assessments constitute a direct burden upon interstate commerce in violation of Article I, Sec. 8, Sub-Sec. 3, of the Constitution of the United States." (See opinion, Record, p. 48.)

After discussing Section 73 of the Tax Code (P. Appendix A),* under which the so-called capital of the respondent was attempted to be assessed, the opinion continues,

> "What has been said about doing business in Virginia, in connection with the income tax, applies here, and in considering this phase of the case it must be borne in mind that the tax sought to be imposed is one upon property which is entirely intangible and which is used wholly and exclusively in interstate commerce. *No part of this property is used in any Virginia transaction whatever.* It produces absolutely nothing in this State. The money in the Lynchburg bank and the bills and ac-

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*All references to the record (R), petition (P), and this brief (B), are to pages of such as filed in this Court. Parties are referred to in accordance with their position in this Court. Italics are supplied by counsel except where otherwise stated.

counts receivable in the Lynchburg office, which are the subject of the tax, are in those respective places, not because of any intrastate transaction, but because of the exclusive interstate business the sales company is conducting. The very creation and existence of this intangible property is traceable, directly to interstate commerce. *It is a necessary and inseparable outgrowth of that commerce.* It, in fact, is a part of the interstate commerce that the sales company conducts.

"In passing, it may be well to call attention to Section 427 of the Tax Code," (Appendix B), "not only for the purpose of showing what property is exempt from an ad valorem and income tax but for the additional purpose of showing the legislative policy of the state which seems to be in favor of exempting the sales company, under the peculiar facts in this case, and other like corporations, doing a similar business, from any capital or income tax. When section 427 is read and considered, along with the other related sections," (See section 74 Tax Code, Appendix A), "it unmistakably shows a strong leaning and intent on the part of the law makers to exclude such corporations as the sales company from state taxation. Section 427, in part, is as follows: 'No income tax or ad valorem taxes * * * shall be imposed upon the * * * capital or other intangible property * * * owned by corporations organized under the laws of this State for any tax year during which such corporations do, or have done, no part of their business within this State * * *' However, we prefer to rest the decision of the validity of the capital tax here considered upon the broad proposition that it is invalid because it is a burden upon interstate commerce and forbidden by the Constitution of the United States." (R. 51-52.)

Even the decision by the State Court of a federal question will not sustain the jurisdiction of the Federal Supreme Court, if another question, not federal, was also raised and

decided against the Petitioner, and the decision thereof is sufficient, notwithstanding the federal question, to sustain the judgment. *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 32 Sup. Ct. Rep. 236, 56 L. Ed. 510; *Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.*, 243 U. S. 157, 37 Sup. Ct. Rep. 318, 61 L. Ed. 644; *McQuade v. Trenton*, 172 U. S. 636, 19 Sup. Ct. Rep. 292, 43 L. Ed. 581; *Rutland R. Co. v. Central Vermont R. Co.*, 159 U. S. 630, 40 L. Ed. 284; *Brooks v. Missouri*, 124 U. S. 394, 31 L. Ed. 454; *Southern Pac. Co. v. Schuyler*, 227 U. S. 601, 57 L. Ed. 662; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417; *St. Louis Malleable Casting Co. v. George C. Prendergast Const. Co.*, 260 U. S. 469, 67 L. Ed. 351.

Jurisdiction of this Court is not to be defeated by the lower court placing its decisions on a non-federal ground, where such ground is not substantial and sufficient in itself, nor can it be imposed or conferred by the lower court by its failure or refusal to expressly decide a non-federal ground which is sufficient and substantial.

> "But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of a state court rests upon a non-federal ground, to ascertain for itself, in order that the Constitutional guarantees may be appropriately enforced, whether the asserted non-federal grounds, independently and adequately supports the judgment." *Abie's State Bank v. Bryan*, 288 U. S. 765, at page 773, 75 L. Ed. 690, at page 701, and cases there cited.

It is to be noted that in the instant case the decision of this Court will not be determinative of the question as to the validity of the tax assessed on respondent. The Supreme Court of Appeals of Virginia has in effect held that the Virginia statutes relied on were not applicable to respondent Company, and it was therefore not subject to the tax imposed,

though the opinion does state that this decision is based on the broader ground that such tax would, in any event, be unconstitutional. If the Writ of Certiorari should be granted and the decision reversed, the question would still be whether the tax was properly assessable under the Virginia statutes, and the Virginia Court has in effect held that it was not.

Thus, as the matter now stands, the decision would be in the nature of a moot decision. Unless and until Virginia has a statute which does impose the tax in question, it is immaterial whether such a statute would be constitutional or not.

The same idea is expressed in a general way in the opinion of Mr. Justice Stone in the case of *Nashville Chattanooga & St. L. Ry. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 58 S. Ct. 345, in a tax case, in which it was held that the Court did have jurisdiction because the decision of the Court would be determinative of the tax. In the instant case, it would obviously not be determinative of the tax, for reasons stated. In the case last cited the opinion refers to the fact that

> "Obviously the appellant, whose duty to pay the tax would be determined by the decision in this case, is not attempting to secure an abstract determination by the Court of the validity of a satute (citing cases), or a decision advising what the law would be on an uncertain or hypothetical state of facts . . ."

It is respectfully submitted, therefore, that the instant case does seek to secure an abstract determination of the validity of a statute and also a decision as to what the law would be if the State of Virginia had a statute which in fact placed a tax on respondent Company, and therefore that the writ should be denied.

III.

STATEMENT OF CASE

The statement on page 9, Brief of Petitioner: "The property was 'capital' as defined by Virginia law," is not exactly in accord with the statute as construed by the Supreme Court of Appeals of Virginia. (R. 51.) The facts as set out by the Supreme Court of Appeals of Virginia, are:

> "The sales company is a domestic corporation with its principal office in Lynchburg, Va., but it maintains a branch office in Cincinnati, Ohio. It conducts a sales agency, and its sole business is that of selling coal for foreign coal mining corporations, whose business and mines are all located outside of the State of Virginia, to-wit, in West Virginia. It not only sells the coal, but it directs and manages its shipment and transportation, collects the proceeds of sales, and is paid a commission of 8 per cent. No coal of any consequence is sold in Virginia. It is sold in carload lots, in many other states.
>
> "The sales company does not own, conduct, or lease any coal mines and does not mine any coal. None of the coal which is sold is located in Virginia at the time of the sale.
>
> * * * *
>
> "The contracts for the sale of the coal are made between the sales company and the purchaser, who knows in every instance the principal, and the kind of coal and the mine from which it is to be shipped. In some instances where the coal is sold in great quantities, the purchaser requires the principal to approve the contract.
>
> "In cases where the coal is not sold by the General Manager himself but sold through the Cincinnati office, the contracts are forwarded to the Lynchburg office for approval, as the sales company guarantees the solvency

> of the purchasers. When the contract of purchase is approved, the Lynchburg office sends orders to the mines for the shipment of coal, directing the kind of equipment to be used and the routing of same. The records of the sales to the various purchasers, the price per ton of the coal, and an account with the mines from which the coal is shipped are kept in the Lynchburg office." (R. 51-52.)

It was never the intention of the sales company nor of its attorneys, by the stipulation (P. 2 and 10), to claim the accounts, belonging in fact and in law, to its principals; but in order to aid in the ascertainment of the amount of its capital, which is varying at all times, it stipulated that the difference between the accounts receivable and accounts payable, together with cash in bank, was the amount upon which it should be taxed, if it were taxable at all. The Company acts as *del credere* coal sales agent for foreign mines, and its capital is the guarantee for payment of coal sold to its customers.

IV.

PETITIONER'S APPARENT CLAIM.

The entire position of Petitioner might be treated under the one claim "B", (P. p. 12), viz:

> "The tax was valid, since the burden is so indirect as not to amount to a regulation of interstate commerce."

While we believe this to be the sole question in the case, we will first briefly outline and answer what we consider to be the contentions of Petitioner embodied in "A" and "C", (P. p. 12), i. e.:

That the respondent being a Virginia corporation, with principal office at Lynchburg, Va., at which office it accepts

contracts and orders, and keeps its records, the doctrine of *mobilia personam sequuntur* applies, and it is subject to the ad valorem tax upon its so-called capital on account thereof; and that the reasoning and principle applied in cases involving privilege and other taxes upon interstate commerce, have no application where the tax is upon property of interstate commerce.

V.

ARGUMENT.

(1) Contention in "A" and "C" (P. p. 12).

(a) We have repeatedly challenged counsel for the Petitioner to produce a case in which a *State tax upon capital, as such*, of a corporation engaged *solely* in interstate commerce, has been upheld. Frankly, we have been unable to find where any state has heretofore attempted such a tax. In the absence of such authority, we feel that the Court of Appeals in applying "the reasoning and principles," of other cases involving taxation of interstate commerce in other ways, was correct (R. p. 59). The underlying principles are the same regardless of the name or form of tax, nor does it matter that the tax is called an *ad valorem tax*, or by what term it be most properly denominated, it is the effect of the tax rather than the name and form that determines its validity.

> "The language of the act and the decisions of the courts of the states are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive, for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate commerce." *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments*, 280 U. S. 338, at pp. 346-347, 74 L. Ed. 463, at p. 468.

"If the State cannot tax transportation, may it, nevertheless tax fares and freights received therefrom? Where is the difference? Looking at the substance of things, and not at mere form, it is very difficult to see any difference. The one thing is tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning." *Philadelphia & S. Mail S. S. Co. v. Penn.*, 122 U. S. 326, 30 L. Ed. 1200; see also *McCallen v. Mass.*, 279 U. S. 620, 73 L. Ed. 874; *Crew-Levick Co. v. Penn.*, 245 U. S. 292, 62 L. Ed. 295; *Alpha Portland Cement Co. v. Mass.*, 268 U. S. 203, 69 L. Ed. 916.

(b) Nor is there any distinction to be made between a foreign and domestic corporation engaged in interstate commerce:

Philadelphia & S. Mail S. S. Co. v. Penn., Supra; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 30 L. Ed. 694; *Alpha Portland Cement Co. v. Mass.*, Supra; *Bacon v. Illinois*, (U. S.), 57 L. Ed. 615, *Galveston, etc., R. R. Co. v. Texas*, (U. S.), 52 L. Ed. 1031; *Gloucester Ferry Co. v. Penn.*, 114 U. S. 196, 29 L. Ed. 158.

(c) Nor does the maintenance of an office in the State at which orders are accepted and records kept, constitute an intrastate business such as will support the tax:

Western Cartridge Co. v. Emmerson, (U. S.), 74 L. Ed. 1004; *Frust v. Brewster*, (U. S.), 75 L. Ed. 478; *International Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. Ed. 687.

(d) And while the doctrine *mobilia personam sequuntur* is applicable in certain cases, more especially in determining the *situs* of intangible property for the purpose of inheritance tax, (See *Baldwin v. Missouri*, 281 U. S. 586, and *Lawrence v. State Tax Commissioner of Mississippi*, 286 U. S. 276, P. p. 13), it is not of universal application in cases involving the taxation of interstate commerce.

> "Where is the *situs* of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the working of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work done? Clearly, as we think, the latter."

And again,

> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was '*Mobilia personam sequuntur*', but that maxim was never of universal application, and seldom interfered with the right of taxation. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18." *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, and upon rehearing under the same style, 166 U. S. 185, at pp. 223-224, 41 L. Ed. 976, at pp. 978-979, relied upon by Petitioner. (R. p. 16).

(2) Contention that:

> "The tax was valid since the burden is so indirect as not to amount to a regulation of interstate commerce." (P. p. 12.)

Frankly, we can conceive of no tax resting more directly upon a business than a tax upon its *capital, as such.* While

great latitude has been accorded to the several states in matters of taxation upon property employed in interstate commerce, having a physical presence in the taxing state, we are not advised of, nor has the Petitioner produced, any case wherein a *tax upon capital, as such,* has been allowed; and, this we think for the very good reason that capital and business are in fact inseparable. While certain physical properties of a corporation engaged in interstate commerce may be sequestered, by the state in which they have their *situs,* for the purposes of taxation, capital, *by the very nature of the thing itself, cannot be divorced from the business in which it is employed.* Without capital business cannot be carried on; and without business capital produces nothing.

> "No part of this property is used in any Virginia transaction whatever. It produces absolutely nothing in this state. * * * It is a necessary and inseparable outgrowth of that commerce. It, in fact, is a part of the interstate commerce that the sales company conducts." Opinion court below, (R. p. 52).

But, Petitioner contends that this is nothing more or less than an ad valorem tax upon property having a *situs,* by the application of the doctrine of *Mobilia personam sequuntur,* in the State of Virginia. This we answer above in effect that, it is not the name or form, but the effect of the tax, and that the doctrine of *Mobilia personam sequuntur* is inapplicable to the case at bar. *But, aside from this we say—our capital is inseparable from our business, and any tax thereon is a direct tax upon the business,* confessedly solely an interstate commerce business, (P. 2, 10), *and is invalid.*

Petitioner contends that there is no distincton to be made between a tax upon tangible or intangible property employed in interstate commerce. This we feel is the very heart of the difficulty here presented. While the tax upon the physical

property employed in interstate commerce is construed as only indirectly affecting such commerce, and in ascertaining the value of such property as a part of a going concern, resort to the gross receipts, capital and other intangibles of the corporation, is allowed, nevertheless, such intangibles standing alone cannot be made the basis for such a tax, and *any tax upon the gross receipts or capital, as such,* of a corporation engaged in interstate commerce, *is a direct tax upon the business, and void.*

The quotation by Petitioner, appearing on pages 15 and 16 of the Petition, from *New Jersey Telephone Co. v. Tax Board,* 280 U. S. 338, 346, 74 L. Ed. 463, 467, is immediately followed:

> "But as the Constitution vests exclusively in Congress the power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce, *or tax as such, gross receipts derived therefrom,* or impose a license fee or other burden upon the occupation or privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

And though Petitioner contends that there is no distinction between the taxation of tangible and intangible property, employed in interstate commerce, distinction is noted in numerous cases quoted from by the Petitioner as well as respondent.

> "*The right to lay taxes on tangible property* or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts only interstate business within her borders, an excise tax measured by a combination of two factors, etc. Alpha Portland Cement Co. v. Mass., (*Supra*).

> "Thus a state cannot tax interstate commerce, either by laying a tax upon *the business* which constitutes such

commerce, or the privilege of engaging in it, *or upon the receipts, as such*, derived from it." *Minn. v. Blasius*, (U. S.), 78 L. Ed. 19, at page 22, and the cases there cited.

"'By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, *ascertained by reference thereto*, it is not open to attack as inconsistent with the Constitution.' (Citing cases.) The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconcilitation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly, as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. Stockard v. Morgan, 185 U. S. 27, 37, 46, L. Ed. 785, 794, 22 Sup. Ct. Rep. 576; Asbell v. Kansas, 209 U. S. 251, 254, 256, ante, 778, 780, 781, 28 Sup. Ct. Rep. 485." *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217 at 227, 52 L. Ed. 1031 at 1037.

"It may be answered that no foreign or interstate commerce can be carried on by citizens of a state without the use of a wharf or other place within its limits on which passengers and freight can be landed and received,

and the existence of power in a state to impose a *tax upon the capital* of all corporations engaged in foreign and interstate commerce for the use of such places would be inconsistent with and entirely subversive of power vested in Congress over such commerce." *Glouchester Ferry Co. v. Penn.*, 114 U. S. 196, 29 L. Ed. 158, at page 162. (P. 17, 18). See also *Pullman's Palace Car Co. v. Richardson*, 261 U. S. 330, 67 L. Ed. 682; *Ozark Pipe Line v. Monier*, 266 U. S. 555, 65 L. Ed. 439; *Meyer v. Wells Fargo Co.*, 223 U. S. 298, 69 L. Ed. 455; *U. S. Express Co. v. Minn.*, 223 U. S. 335; *Postal Tel. Co. v. Adams*, 155 U. S. 688.

From the above it is observed that the law upon the subject is that while resort may be had to the gross receipts and capital employed in interstate commerce, *when such receipts or capital are not taxed as such*, but are taken as a mere measure or basis to get at the going concern value of tangible property located in the State, for purposes of taxation, the tax is considered indirect, and is permitted; *but, all taxes upon the gross receipts of, or capital employed in interstate commerce, as such, is a direct tax upon that commerce, and void.*

We commend to the special attention of the Court the opinion of Justice Gregory of the Supreme Court of Appeals of Virginia, as found in Transcript of Record p. 46, et seq. We also call attention to the fact that the authorities cited in the brief for the Commonwealth of Virginia, in support of the petition, are all cases in which the taxes were either held invalid, or if held valid, were cases in which the tax had a definite basis in substantial real property or tangible personal property in the State, or in substantial intrastate business done (as well as interstate business). No decision has been found upholding a tax based on capital where the corporation neither had real property nor tangible personal

property in the State, nor did any intrastate business which could be used as the basis for the tax.

It is to be noted that one of the cases so strongly relied on, namely, the case of *People v. Commissioners*, 104 U. S. 466 (P. p. 19), was a case in which the Court specifically held that the tax was placed on money of Hanemann which was in fact in money on January 1st, the taxable date, and that there was no evidence "that the capital which he thus employed in the business of purchasing cotton for exportation, was, in fact, so invested on the first day of January, 1876. We have no occasion, therefore, in the present case, to consider or determine the questions of Constitutional law discussed by counsel." (P. p. 21). Such is obviously not true of the case at bar.

We also commend to the special attention of the Court the case of *Ozark Pipe Line Corporation v. Monier*, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439, and dealt with at length in the opinion of Justice Gregory (R. p. 54-57). In that case while as stated by the Virginia Court the tax was "styled a franchise tax," the Court holds that it was in fact a property tax, and since it was assessed on capital engaged solely in interstate commerce, it was held invalid.

VI.

CONCLUSION.

We respectfully submit that for reasons hereinbefore shown, as well as for numerous other reasons obvious and apparent upon the face of the record, the Petition of the Commonwealth of Virginia, for a Writ of Certiorari, to the Supreme Court of Appeals of Virginia, should be denied.

JAMES R. CASKIE,
F. P. CHRISTIAN, JR.,
Attorneys for Respondent.

APPENDIX A.

VIRGINIA CODE OF 1930, APPENDIX, THE TAX CODE, P. 2148.

Sec. 74. Non-residents; taxation of such capital.—Every non-resident person, all foreign corporations and all partnerships consisting in whole or in part of non-resident persons, doing business in this State, are hereby declared to have a business domicile within this State and shall report the above items as capital used or employed in this State to the same extent as if they were residents of this State. All money on hand and on deposit, bills and accounts receivable, obligations, credits, demands and claims and all other intangible assets used or employed in the Virginia business are hereby declared to be capital used or employed within this State and at the business domicile of such foreign corporation, non-resident person or non-resident partnership, its or their agents, or representatives, whether the physical evidences of such intangible assets are kept within the State or not. The amount of the aforesaid intangible assets having a situs within this State shall be determined by an allocation and separate accounting when the books of such person, corporation or partnership show the amount of such assets hereby declared to have a situs within this State. (Tax Bill, secs. 8, 9; 1908, p. 33; 1915, pp. 98, 160; 1916, p. 655; 1918, p. 171; 1920, p. 793; 1922, p. 551; 1924, p. 468; 1926, p. 955; 1930, p. 890.)

APPENDIX B.

VIRGINIA CODE OF 1930, APPENDIX, THE TAX CODE, P. 2251.

Sec. 427. Corporations organized under the laws of this State but which do no business in this State; taxation.—No income tax nor ad valorem taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property heretofore or hereafter owned by corporations organized under the laws of this State for any tax

year during which such corporations do, or have done, no part of their business within this State; and there mere holding of stockholders' meetings, annual or special, in this State, or the doing of any act or acts in this State now or hereafter required by the laws thereof to be done in this State, shall not be construed as doing any business in this State within the meaning of this section; provided, that if while any such intangible property is subject to any taxation under the laws of this State, it be assigned or transferred to any such corporation, such property shall continue during the current tax year to be subject to all taxes now or hereafter imposed by law upon such property, just as if such assignment or transfer had not been made. All liens, now or hereafter provided for by law, on property, so assigned or transferred, for taxes during such current tax year, are hereby preserved, and such taxes may be assessed either against the assignor or the assignee, and however assessed, may be collected of either by any of the methods now or hereafter provided for by law. (1916, p. 830; 1918, p. 356; Code 1919, sec. 2313.)